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MAY 25 1962
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 143

H. HENRY YOUNG,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	13
Appendix A: Opinion Below	14
Appendix B: Statute Involved	16

Citations

Cases

Bremmer v. *United States*, 347 U.S. 227	9
Burns v. *United States*, 287 F.2d 216	9
Daudridge v. *U. S.*, 356 U.S. 259	10, 11
Domenica v. *United States*, 292 F.2d 483	7, 8
Gearhart v. *United States*, 272 F.2d 499	9, 11
Green v. *United States*, 365 U.S. 301	6
Hamilton v. *United States*, 219 F.2d	9
Iauges v. *Green*, 282 U.S. 351	9
Larson v. *United States*, 296 F.2d 167	9
Poole v. *United States*, 250 F.2d 396	8
Powell v. *Alabama*, 287 U.S. 45	9
Reynolds v. *Cochoran*, 365 U.S. 525	9, 10
Swaggerty v. *U. S.*, 218 F.2d 875	8
United States v. *Davis*, 212 F.2d 264	6
United States v. *Lester*, 247 F.2d 496	7, 8
United States v. *Lias*, 173 F.2d 685	12, 13
United States v. *Mack*, 249 F.2d 421	6, 8

Statutes

Rule 11, Federal Rules of Criminal Procedure	2, 6, 7, 8
Rule 32 (d) Federal Rules of Criminal Procedure	3, 5, 8

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Supreme Court of the United States

OCTOBER TERM, 1961

No.

H. HENRY YOUNG,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit be entered in the above-entitled case decided April 27, 1962.

Citations to Opinions Below

No opinion was written by the District Court. The opinion of the Court of Appeals for the First Circuit is printed as Appendix A of this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on April 27, 1962. (DR 174)*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Before accepting a plea of guilty must a federal judge, under Rule 11 of the Federal Rules of Criminal Procedure, even though the defendant is represented by counsel, determine that the plea is made not only voluntarily but with an understanding of the nature of the charges?

2. Does the failure to hold a hearing before denial of a pre-sentencing motion to withdraw a plea of guilty constitute an abuse of discretion, a violation of the right to trial by jury as guaranteed by Article III and by the Sixth Amendment of the United States Constitution, or a violation of procedural due process as guaranteed by the Fifth Amendment?

3. When during the course of a hearing on a post-sentencing motion to withdraw a guilty plea there is uncontradicted evidence that the defendant had a mental illness at the time that the guilty plea was entered, is the trial judge required to order a medical examination to determine whether the defendant was actually so disturbed that his plea was not made voluntarily and with an understanding of the charges against him?

4. When there is evidence that the defendant's attorney made representations that a probationary sentence and a small fine would be recommended, and the defendant testifies that he believed these representations and relied on them when he pleaded guilty, is it error to hold that such

*Reference to "DR" are to the Record Appendix filed by the petitioner, and references to "G.R." are to Respondent's Record Appendix.

evidence is of no legal significance when deciding whether "manifest injustice" will result if the guilty plea is not withdrawn?

Statute Involved

The statutory provisions involved are Rule 11 and Rule 32 (d) of the Federal Rules of Criminal Procedure. These provisions are printed in Appendix B attached hereto.

Statement of the Case

On October 14, 1960 the petitioner was indicted with three co-defendants under an indictment which alleged concealment of assets from a trustee in bankruptcy in violation of 18 U.S.C. section 152 in Counts 1 through 21. In Count 22 the petitioner was accused of conspiracy under 18 U.S.C. section 371. (GR 6-35) The petitioner was arraigned and pleaded not guilty on October 31, 1960.

Trial was commenced on October 3, 1961 with the petitioner as the sole defendant, the other defendants having pleaded guilty. Before the Government resumed its opening statement following the noon recess on the first day of trial, a change of plea was entered by the petitioner and accepted by the court. During the recess a conference had been held in the judge's lobby. The record shows that the following colloquy took place: (DR 34-35, GR 55-56).

Afternoon session
2:15 P.M.

(Conference in the lobby)
The Court: Take the plea
The Clerk: United States v H. Henry Young
Mr. Noonan: I understand, may it please the Court,

that there is to be a change of plea in this case. May I ask that it be taken?

The Court: Take the plea, Mr. Clerk.

The Clerk: H. Henry Young, to three counts of this 22 count indictment, Count 1, Count 2 and Count 22, charging you with wilfully, unlawfully and knowingly concealing property of the bankrupt estate from the Trustee in Bankruptcy and with wilfully and knowingly conspiring to defeat the bankruptcy law, you have previously pleaded not guilty. Do you wish to change your plea?

Defendant H. H. Young: Yes, I do.

The Clerk: What say you now as to Counts—

Defendant H. H. Young: On count 1 and 2, that is specifically Madison?

The Court: Yes, that's right. Counts 1 and 2 refer to Madison.

Defendant H. H. Young: Yes, sir! I plead guilty.

The Clerk: What say you to Count 2?

Defendant H. H. Young: Guilty

The Clerk: What say you to Count 22?

Defendant H. H. Young: Guilty.

The Court: Now, you entered that plea voluntarily, did you Mr. Defendant?

Defendant H. H. Young: Yes, sir!

The Court: All right, sir. Now, the case will be continued on the same bail, Mr. Noonan, until we set it down for disposition in a week or two; right?

Mr. Noonan: Yes, your Honor.

The case was set down for disposition on December 14, 1961, but before sentence was imposed counsel for petitioner made an oral motion that the petitioner be allowed to withdraw his plea of guilty and the case proceed to trial on all 22 counts of the indictment. (DR 37-38, GR-58-59).

This motion was denied without evidence being taken and without argument by counsel.

After denial of the motion, the court heard argument prior to imposing sentence. (DR 43-59; GR 59-75). In his argument the petitioner's counsel, in view of the petitioner's lack of prior felony convictions and based on the fact that the petitioner has three young children, recommended that the court impose a sentence of one year or less and no fine. (Dr. 58-59). Counsel for the Government recommended a four year sentence on counts 1, 2 and 22 with sentences to run concurrently. Counsel for the Government further recommended a $20,000 fine. The Government's recommendations were accepted by the court. (GR 78)

The petitioner on December 18, 1961, filed a motion under Rule 32 of the Federal Rules of Criminal Procedure, to vacate the judgment and to withdraw the guilty plea. (DR 62). The petitioner also filed an affidavit stating that he was innocent as to the entire indictment, and that it was his understanding that the guilty plea on the conspiracy count (Count 22) was limited to the transactions of only one of the eleven corporations named in that count. (DR 63). At the hearing on this motion, it was brought out through the uncontradicted testimony of the petitioner that he suffered from a war-related nervous disorder for which he had received psychiatric treatment, and that at the time the guilty plea was entered he was suffering from this disorder. (DR 68-69, 78-79)

This motion was denied and an appeal was taken. On appeal the decision of the district court was affirmed in a *per curiam* opinion which is annexed hereto as Appendix A.

Reasons for Granting the Writ

I.

Prior to the decision in the case at bar the decisions of the various Circuit Courts of Appeals presented a reasonably distinct and uniform standard for a district court judge to follow when discharging the duty imposed by Rule 11 of the Federal Rules of Criminal Procedure. The petitioner respectfully submits, however, that the decision of the Court of Appeals for the First Circuit in this case, even if not found to be irreconcilable with decisions of other circuits, makes the mandate of Rule 11 so unclear that a definitive statement is needed in order to protect the rights of defendants in Federal courts. In short, the petitioner asks this court to clarify the requirements of Rule 11 of the Federal Rules of Criminal Procedure as it did with Rule 32 (a) in *Green* v. *United States*, 365 U.S. 301.

It is clear from the words of Rule 11 that the trial court must make this two-fold inquiry before accepting a plea of guilty: (1) Is the plea voluntarily made? (2) Is the plea made with an understanding of the nature of the charges?

That the Court of Appeals for the Seventh Circuit has adopted this meaning of Rule 11 can be seen from its decision in *United States* v. Mack, 249 F.2d 421, 423 where the Court said that

> "the very absolute minimum required to comply with the mandate of Rule imposed upon the District Court the necessity of ascertaining if that was the defendant's desire; if she was pleading guilty voluntarily and if she understood the nature of the charges to which she was entering a plea of guilty."

For an earlier formulation of this principle by the same court see *United States* v. *Davis*, 212 F.2d 264.

From the decision of the Court of Appeals for the Second Circuit in *United States* v. *Lester*, 247 F.2d 496, 500 it is clear the trial judge before accepting a plea of guilty must "thoroughly investigate the circumstances under which it is made." Although the court in the *Lester* case does acknowledge that a more searching inquiry is required when the defendant is without counsel, it is also said that "the asking of several standard questions" is not sufficient, if the defendant has counsel.

As recently as June 1961 when the Court of Appeals for the First Circuit decided *Domenica* v. *United States*, 292 F.2d 483, in an opinion which quoted extensively from the *Lester* case, it would have seemed that a trial judge sitting in the First Circuit was bound to apply Rule 11 exactly the same as trial judges in the Seventh and Second Circuits. Indeed, the factual situation in *Domenica* was less compelling than the *Lester* case, for the defendant in *Domenica* was represented by counsel of his own choice when the guilty plea was entered.

The opinion of the Court of Appeals in the case at bar contains the following discussion of the Rule 11 inquiry:

> "At the time the appellant was represented by competent counsel *but nevertheless* the court asked the defendant-appellant personally if he entered his pleas voluntarily and he answered: 'Yes, sir' ". (emphasis supplied)

Clearly from the use of the word "nevertheless" it was the opinion of the Court that the trial judge, in a case where the defendant has counsel, is not even required to make the cryptic inquiry made by the judge in the case at bar.

The petitioner respectfully submits that the *per curiam* opinion of the Court of Appeals for the First Circuit, in which no authorities are cited, represents a departure from

the rule of the Seventh Circuit as announced in *United States v. Mack*, 249 F.2d 421 and the rule of the Second Circuit as announced in *United States v. Lester*, 247 F.2d 496. Moreover, it is the petitioner's position that by approving the practice of asking a defendant only whether his plea is voluntary, the court so diminished the precedent value of *Domenica v. United States*, 292 F.2d 483, that meaning of Rule 11 in First Circuit is now unclear.

II.

With the exception of the failure to properly investigate the petitioner's mental condition discussed below, the petitioner does not assert that the hearing conducted on the post-sentencing motion was inadequate. It is the petitioner's position, however, that a hearing conducted after sentencing is not the equivalent of a hearing conducted prior to sentencing, because the petitioner was faced with a substantially heavier burden of proof on the post-sentencing motion than on the motion made prior to sentence.

Although the language of Rule 32 (d) of the Federal Rules of Criminal Procedure does not spell out any standards for granting a withdrawal before sentence, it is apparent from the use of the phrase "to correct manifest injustice" with respect to withdrawal after sentencing that the burden on the defendant is lighter when the motion is made before sentencing. This distinction was recognized in *Poole v. United States*, 250 F.2d 396 and *Swaggerty v. United States*, 218 F.2d 875 cert. den. 349 U.S. 959.

In the case at bar no hearing was granted on the petitioner's motion to withdraw his plea of guilty before sentencing. (DR 36-37; GR 58-59) While there is no question that this motion is addressed to the discretion of the trial judge, the concept of judicial discretion has implicit within it the principle that a discretionary act will not be

taken until the Judge has adequately informed himself. *Gearhart* v. *U. S.*, 272 F.2d 499, 502.

This court defined the word "discretion" as follows in *Langnes* v. *Green*, 282 U.S. 531, 541:

> "The term 'discretion' denotes the absence of a hard and fast rule. The *Styria* v. *Morgan* 186 U.S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion with regard to what is right and equitable under the circumstances and the law and directed by the conscience of the Judge to a just result."

Although *Langnes* was an admiralty case, this definition has been applied in criminal cases. *Burns* v. *United States*, 287 U.S. 216; *Larson* v. *United States*, 296 F.2d 167; *Hamilton* v. *U. S.*, 219 F.2d 364.

The petitioner respectfully contends that it was an abuse of discretion for the trial judge to deny his pre-sentencing motion without a full hearing. This contention is supported by the decision of this court in *Bremmer* v. *United States*, 347 U.S. 227, a case in which the trial court, in the exercise of its discretion, denied without a hearing a motion for a new trial.

In addition to abusing his discretion, the trial judge also deprived the petitioner of a fundamental constitutional right by failing to hold a hearing on his motion to withdraw the plea. While the famous case of *Powell* v. *Alabama*, 287 U.S. 45 is frequently cited for the proposition that due process requires that an accused by given the right to counsel, this court has recently held in *Reynolds* v. *Cochoran*, 365 U.S. 525 that the right to counsel is effective only so long as counsel is given the opportunity to be heard. The petitioner respectfully submits to this court that following passage from *Powell* v. *Alabama*, supra, which is

quoted in *Reynolds* v. *Cochoran*, supra, at p. 529, is desposi-tive of his case:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by or appearing for him, it reasonably may not be doubted that such a refusal would be denial of a hearing, and therefore of due process in the constitutional sense."

III.

During the course of "the" hearing on the post-sentencing motion there was testimony of the petitioner's wife (DR 67-71, GR 85-88) and the petitioner (DR 78-79, 89-90, GR 95-96, 106-107) relating to the mental condition of the petitioner at the time of trial. The trial judge also had before him as an exhibit a memorandum from the files of the attorney who first represented the petitioner, which contained a description of the petitioner's mental health background and a brief description of his psychiatric treatment. (Dr 150-151). In spite of this evidence, which was uncontradicted by any government evidence and not mentioned during the government's cross examination of the petitioner or his wife, the trial judge made no order for a psychiatric examination. Moreover, from that portion of the opinion of the Court of Appeals where it is said "(t)hat there is nothing whatever to show that the defendant's change of plea was not made voluntarily and with full knowledge of its consequences," it would seem that this evidence was held to be without significance.

Factually the case at bar is substantially the same as *Dandridge* v. *United States*, 356 U.S. 259, a case in which this court held that when it is alleged that a guilty plea was rendered by a defendant who was mentally incompetent

to enter such a plea, evidence should be taken to determine the mental condition of the accused.

The holding of the *Dandridge* case is difficult to discern because short per curiam opinions were written in the Court of Appeals and in this court, yet the holding which the petitioner sets forth above is that which was given to the *Dandridge* case in *Gearhart* v. *United States*, 272 F.2d 499.

Since the defendant in *Gearhart* alleged inability to reason at the time of the crime as well as the time he pleaded guilty, the court held that a determination of the defendant's mental condition would involve a decision on an affirmative defense, so the failure of the trial judge to order a mental examination was not error. It is clear, however, from the opinion in the *Gearhart* case that when there is an allegation only of incompetence at time of pleading a mental examination should be ordered.

IV.

In his affidavit filed in conjunction with the post sentencing motion to withdraw his plea, the petitioner swore that he entered the plea based on information that he would receive probation and a small fine (DR 63). The petitioner testified at the hearing on this motion that his attorney had told him the United States Attorney's office had indicated that on a plea of guilty there would be a small fine and probation. (DR 77,78)

In spite of the affidavit and this testimony, and apparently relying solely on the testimony of the petitioner's attorney (DR 96-99), the opinion of Court of Appeals for the First Circuit states: "*There is nothing whatever to show* that the defendant's change of plea was not made voluntarily and with full knowledge of its consequences or that it was made upon representations of the United States

Attorney that he could recommend a light sentence." (Emphasis supplied)

Since it is very unlikely that the Court of Appeals was unaware of the existence of petitioner's affidavit and testimony, it must be assumed that words "nothing whatever" in the opinion are to be taken as meaning "nothing whatever of *legal significance.*"

There being no citation of authority in the opinion, it is difficult to determine the source of the rule which says that the testimony of a defendant as to representations made to him and testimony as to his beliefs prior to pleading guilty are without legal significance.

The petitioner respectfully submits that the rule is to the contrary. A district judge must determine whether representations were made to a defendant and whether the defendant could reasonably rely on such representations.

In *United States* v. *Lias*, 173 F.2d 685, 687, the court quotes with approval the following language from a memorandum filed by district judge after hearing a motion to withdraw a plea:

> "The defendant has sworn to his motion to vacate judgment. He says under oath that he entered his plea because he believed that he would be put on probation or receive a suspended sentence. If the defendant had that bona fide belief in his mind and if that belief was a controlling factor in causing him to enter a plea of guilty, the court has to take that belief into consideration irrespective of the kind of information upon which it was founded."

Since the district judge in the case at bar filed no opinion or memorandum, it is impossible to tell what weight, if any, he assigned to the petitioner's affidavit and testimony. Thus it is impossible to tell whether he considered this

evidence. Moreover, the language of the Court of Appeals' opinion indicates that, as a matter of law, this evidence is without significance. This decision is squarely in conflict with the decision of the Court of Appeals for the Fourth Circuit in *United States v. Lias*, 173 F.2d 685.

Conclusion

For the foregoing reason this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 5954.

H. HENRY YOUNG,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Israel Bernstein for appellant.

James W. Noonan, Special Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

April 27, 1962.

PER CURIAM. During the course of trial on October 3, 1961, the appellant changed pleas of not guilty to pleas of guilty as to the first two and last counts of a 22 count indictment returned against him and others almost a year before charging various substantive offenses in connection with proceedings in bankruptcy in violation of Title 18 U.S.C. § 152, and in its final count with conspiracy in connection therewith in violation of Title 18 U.S.C. § 371. At the time the appellant was represented by competent counsel but nevertheless the court asked the defendant-appellant

personally if he entered his pleas voluntarily and he answered: "Yes, sir." On December 14, 1961, when the appellant appeared for sentence the court without objection granted the government's motion to dismiss counts 3 through 21 of the indictment, and thereupon counsel for the appellant moved orally for leave for the defendant to withdraw his previous pleas of guilty as to counts 1, 2 and 22 and to go to trial on those counts on reinstated pleas of not guilty. The court immediately denied the motion and proceeded to sentence, but stayed execution to December 19. On December 18 defendant's counsel filed a written motion under Rule 32(d) of the Federal Rules of Criminal Procedure to vacate the judgment of sentence and for leave to withdraw the defendant's pleas of guilty and accompanied his motion with an affidavit. The court after full hearing on the motion denied it and thereupon the defendant took the present appeal to this court.

The appellant has been represented throughout by diligent and skillful counsel well versed in the practice of criminal law in the federal courts, and an examination of the record discloses that he is an intelligent, educated, experienced business man who changed his pleas to guilty after full consultation with his counsel. There is nothing whatever to show that the defendant's change of plea was not made voluntarily and with full knowledge of its consequences or that it was made in reliance upon representations of the United States Attorney that he would recommend a light sentence. On the contrary, the evidence is that the United States Attorney refused to disclose what his recommendation for sentence would be in the event the defendant chose to plead guilty. Under these circumstances there was no abuse of discretion in denying the motion to vacate sentence.

Judgment will be entered affirming the judgment and orders of the District Court.

Appendix B

Federal Rules of Criminal Procedure

Rule 11.

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

VII. Judgment

Rule 32.

Sentence and Judgment

(a) . . .

(b) . . .

(c) . . .

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

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No. [redacted] 143

In the Supreme Court of the United States

OCTOBER TERM, 1962

H. HENRY YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rules involved	2
Statement	3
Argument	9
Conclusion	14

CITATIONS

Cases:

Dandridge v. *United States*, 356 U.S. 259	13
United States v. *Lester*, 247 F. 2d 496	10
United States v. *Lias*, 173 F. 2d 685	14
United States v. *Mack*, 249 F. 2d 421	10

Statute and Rules:

18 U.S.C. 152	3
Rule 11, F.R. Crim. P	2, 10
Rule 32, F.R. Crim. P	2–3

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 998

H. HENRY YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. II,[1] 177–179; Pet. App. 14–15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1962 (R. II, 179). The petition for a writ of certiorari was filed on May 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The government's "Record Appendix to Motion to Affirm or Dismiss" in the court below is designated herein as "R. I." and petitioner's "Record Appendix to Brief for Appellant" as "R. II."

QUESTIONS PRESENTED

1. Whether the district court adequately complied with Rule 11, F.R. Crim. P., before accepting petitioner's pleas of guilty made after the trial began.

2. Whether the court properly denied, without a full hearing, a pre-sentence motion to withdraw pleas of guilty, where counsel stated the reason for making the motion and did not request a hearing.

3. Whether at a hearing on a post-sentence motion to withdraw pleas of guilty, the court could, in the circumstances of this case, proceed without ordering a psychiatric examination of petitioner, where new counsel, retained for the motion, made no request for such an examination.

4. Whether the court, after a hearing, properly denied petitioner's post-sentence motion for leave to withdraw pleas of guilty.

RULES INVOLVED

Rule 11, F.R. Crim. P., provides:

> PLEAS. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 32, F.R. Crim. P., provides in part:

* * * * *

> (d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo*

contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

STATEMENT

Petitioner and three others were charged in a 22-count indictment returned in the United States District Court for the District of Massachusetts with substantive offenses of concealing from the trustee in bankruptcy assets of certain corporations, in violation of 18 U.S.C. 152, and with a conspiracy to commit such violations (R. I, 6–36). Petitioner's co-defendants pleaded guilty (R. I, 57). Petitioner pleaded not guilty (R. I, 1).

1. At the outset of petitioner's trial, on October 3, 1961, the government attorney made an opening statement detailing the evidence to be produced as to petitioner's involvement in the bankruptcies of the Madison Drug Company and the other corporations named in the indictment (R. I, 41–55). After a noon recess, petitioner indicated his desire to change his pleas of not guilty to guilty on substantive counts 1 and 2, both of which involved only the Madison Drug Company, and on the conspiracy count, which involved Madison and a number of other corporations.[2] The

[2] Petitioner later testified that it was during this recess following the government's opening statement that he first discussed changing his plea with his counsel (R. I, 90).

following colloquy occurred in open court (R. I, 55–56):

(Conference in the lobby.)

The COURT: Take the plea.

The CLERK: *United States* v. *H. Henry Young.*

MR. NOONAN [government attorney]: I understand, may it please the Court, that there is to be a change of plea in this case. May I ask that it be taken?

The COURT: Take the plea, Mr. Clerk.

The CLERK: H. Henry Young, to three counts of this 22 count indictment, Count 1, Count 2, and Count 22, charging you with willfully, unlawfully and knowingly concealing property of the bankrupt estate from the trustee in bankruptcy and with willfully and knowingly conspiring to defeat the bankruptcy law, you have previously pleaded not guilty. Do you wish to change your plea?

Defendant H. H. YOUNG: Yes, I do.

The CLERK: What say you now as to Counts——

Defendant H. H. YOUNG: On Count 1 and 2, that is specifically on Madison?

The COURT: Yes, that's right. Counts 1 and 2 refer to Madison.

Defendant H. H. YOUNG: Yes, sir. I plead guilty.

The CLERK: What say you to Count 1?

Defendant H. H. YOUNG: Guilty.

The CLERK: What say you to Count 2?

Defendant H. H. YOUNG: Guilty.

The CLERK: What say you to Count 22?

Defendant H. H. YOUNG: Guilty.

The COURT: Now, you entered that plea voluntarily, did you, Mr. Defendant?

Defendant H. H. YOUNG: Yes, sir.

* * * * *

2. A sentencing hearing was held on December 14, 1961, at which counsel discussed the dismissal of counts 3 through 21 as to petitioner (R. I, 57, 58). Counsel for petitioner requested the court to entertain a motion to withdraw petitioner's plea of guilty as to counts 1, 2 and 22, stating (R. I, 58):

> Mr. HOMANS [defense counsel]: May it please the Court, * * * before we came here today I had a good deal of discussion with the defendant Henry and he insisted to me, and insists he pleaded guilty, as your Honor knows, to Counts 1 and 2 with respect to the matters from the drug company and also to Count 22, the conspiracy count.
>
> * * * * *
>
> I make this request with a good deal of hesitation, your Honor, but after a great deal of discussion with my client, who states, and I think the transcript will show on the date he entered his plea to the matters—that is, to Counts 1 and 2 and the conspiracy count, he indicated in open court that he was only acknowledging his guilt with respect to the matters in Counts, and so much of conspiracy as related to Madison.

Counsel stated that petitioner was distressed because he felt that although he had pleaded not guilty to counts other than 1, 2 and 22, matters relating to the other counts would be considered against him (R. I, 59). The following ensued (R. I, 59):

The COURT: Well, as I understand it, all of the counts as to which any other defendants have pleaded not guilty are to be dismissed; do I understand that?

Mr. NOONAN: Henry Young pleaded guilty to Counts 1, 2 and 22, and we are now dismissing Counts 3 through 21, all the rest to which he did not plead guilty.

The COURT: Counsel, do you want to withdraw your plea of guilty to Counts 1 and 2 and the conspiracy count; is that your motion?

Mr. HOMANS: Yes, sir. That is the motion.

The COURT: And go to trial?

Mr. HOMANS: Yes, sir.

The COURT: Denied.

* * * * *

Thereafter government counsel recommended that petitioner be given concurrent sentences of imprisonment for four years on each count, a $5,000 fine on each of counts 1 and 2, and a $10,000 fine on count 22, for a total fine of $20,000 (R. I, 69). Defense counsel recommended no more than one year's imprisonment and a smaller fine (R. I, 75). When asked by the court if he had anything to say before sentencing, petitioner stated that he had pleaded guilty to the Madison Drug Company counts and the conspiracy count only so far as Madison was concerned, upon the recommendation of his counsel that he would probably get three or four months and a suspended sentence (R. I, 76). The court imposed the sentence recommended by the government attorney, but stayed execution of sentence until December 19, 1961 (R. I, 78, 38–39, 80).

3. On December 18, 1961, petitioner, through a new attorney, Mr. Bernstein, filed a written motion under Rule 32(d), F.R. Crim. P., for leave to withdraw the guilty pleas to counts 1, 2 and 22, and to restore the case to the trial calendar, alleging that the pleas had not been freely and understandingly entered (R. I, 36). Attached to the motion was petitioner's affidavit that he was not guilty; that his pleas of guilty to counts 1, 2 and 22 related only to the charges involving Madison Drug Company; and that he had been informed that the ultimate sentence would be probation with a small fine (R. I, 36–37).

At a hearing on this motion on December 22, 1961, petitioner's wife testified that when petitioner pleaded guilty on October 3, 1961, he was very pale and upset (R. I, 85–86). Petitioner testified that at that time he was distraught; that his "speech impediment came back again" (R. I, 95, 96). He stated that, while he was "under medication" at the time of the hearing, he did not remember being under medication (except perhaps for taking "an aspirin or something") on the day he changed his plea (R. I, 106–107). He said that when he was discharged from the Army he had been given a 10% disability allowance for a nervous disorder and that he had received 26 hours of psychiatric and group therapy from the Veterans Administration for this nervous disorder in 1946 and 1947 (R. I, 107).

Petitioner explained that he had changed his plea from not guilty to guilty because his former attorney, Mr. Homans, had said that it had been indicated to him at the United States Attorney's office that upon

pleas of guilty, petitioner would get a prison sentence of only three or four months, and that Mr. Homans would plead for a suspended sentence (R. I, 93–95). Petitioner's testimony was that his guilty pleas on counts 1, 2 and 22 were meant to apply only to the charges relating to the Madison Drug Company, and not to the other bankrupt companies mentioned in the conspiracy count 22 (R. I, 91–92). Petitioner admitted knowing, when he pleaded guilty, that companies other than Madison Drug were involved in count 22 (R. I, 98–99). Petitioner stated that he did not discuss count 22 with Mr. Gottlieb, an attorney he had retained before he retained Mr. Homans (R. I, 99), and that he did not remember discussing the conspiracy count with Mr. Homans (R. I, 101–102).

Mr. Homans testified that he discussed with petitioner the conspiracy count and his knowledge of companies other than Madison Drug mentioned in that count (R. I, 111–112). Petitioner understood that counts 1 and 2 involved only Madison Drug, and Mr. Homans explained that a guilty plea to count 22 would be to "the whole conspiracy count" (R. I, 117–118). Mr. Homans testified that, when he had discussed a possible guilty plea with government counsel, counsel had refused to state in advance of the plea what recommendation he would make, but said that it would be for a jail sentence (R. I, 114–115). Mr. Homans told petitioner he thought the government would recommend imprisonment for one or two years (R. I, 115–116). Mr. Homans learned what the government's recommendation would be about three days before sentencing (R. I, 115).

There were introduced in evidence (Gov. Ex. 1–A and 1–B; R. II, 118–171) memoranda of office conferences petitioner had with Mr. Gottlieb regarding the indictment (R. I, 127). These memoranda disclosed that petitioner had discussed with Mr. Gottlieb the charges in counts 1 and 2 (R. II, 168), and in count 22 (R. II, 137–150). The government also introduced a certified copy of the government counsel's opening argument at the trial (Gov. Ex. 2), which petitioner had heard (R. I, 131–132), detailing the proposed proof under the various counts in the indictment.

4. On December 26, 1961, the post-sentence motion for leave to withdraw the guilty pleas was denied (R. I. 5). On appeal from the denial of this motion (R. I, 39–41), the judgment was affirmed (R. II, 179). The court of appeals was of the opinion that there was nothing to show that petitioner's "change of plea was not made voluntarily and with full knowledge of its consequences or that it was made in reliance upon representations of the United States Attorney that he would recommend a light sentence" (Pet. App. 15).

ARGUMENT

1. Petitioner's plea of guilty to three counts of a 22-count indictment was made after the case had gone to trial and the United States Attorney had made an opening statement detailing the evidence by which the government intended to prove its case. Petitioner was then represented by counsel of his own choosing. In these circumstances, the questioning by the court before the plea was accepted was clearly adequate

compliance with Rule 11. Not only were the circumstances such that petitioner must have known the nature of the charges, but the clerk described counts 1, 2 and 22 as charging petitioner with "willfully, unlawfully and knowingly concealing property of the bankrupt estate from the trustee in bankruptcy and with willfully and knowingly conspiring to defeat the bankruptcy law," and petitioner himself mentioned that he knew counts 1 and 2 referred specifically to the Madison Drug Company (R. I, 56). Petitioner announced his plea of guilty to each separate count, and in response to the court's question stated that the pleas were entered voluntarily (R. I, 56). The trial court thus had before it sufficient assurance that the pleas were voluntarily entered with knowledge of the charges.[3]

2. There is no merit to petitioner's argument that the trial court abused its discretion in denying his pre-sentence motion to withdraw his pleas of guilty without a full hearing (Pet. 8–10). While it was not made altogether clear, petitioner was apparently claiming that he intended to plead guilty on counts

[3] The decision below is not in conflict with *United States* v. *Mack*, 249 F. 2d 421 (C.A. 7) and *United States* v. *Lester*, 247 F. 2d 496 (C.A. 2), neither of which involved a plea during trial. In *Mack*, the court did not ask the defendant whether she was pleading guilty voluntarily and it later appeared that she might have been acting under domination of her husband. In *Lester* defendant was without counsel and the court did not ask him whether he was pleading guilty voluntarily. The later hearings in both of these cases suggested involuntariness. Here the evidence at the hearing on the motion to withdraw the pleas of guilty showed that petitioner had conferred with counsel over a long period of time before the plea was changed (see pp. 8–9, *supra*).

1, 2 and 22 as to the Madison Drug Company only; that, since other corporations were mentioned in the conspiracy count, he was afraid that "the merits of all of the counts, including the ones to which his plea of not guilty still remains outstanding, will be gone into"; and that he therefore wished to withdraw all guilty pleas (R. I, 58–59). Whatever superficial plausibility this line of reasoning might have had was seriously discredited by the facts (1) that his plea of guilty to count 22 had been completely unqualified, (2) that he had given no indication at the time he changed his pleas to counts 1, 2 and 22 that those pleas were limited to Madison,[4] and (3) that the most this reasoning would justify would be withdrawal of the plea to count 22. Accordingly, it was altogether proper for the court to deny the presentence motion to withdraw the guilty pleas, and it was equally proper for it to do so without hearing, in view of the fact that petitioner's counsel did not ask for a hearing or for any opportunity to present testimony by petitioner or any other witness in support of the motion; nor did he make any offer of proof when the motion was denied. We submit that both the substance and the procedure of the trial court's denial of this motion, made in the course of the sentencing process,[5] were entirely correct.

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[4] It is an altogether reasonable hypothesis that petitioner's mention of "Madison" in connection with counts 1 and 2 was solely for identification.

[5] From the hearing on the later motion to withdraw, it appears that petitioner's counsel knew at that time what sentence the government would recommend (R. I, 115).

3. Neither by any contention that he made nor by any evidence that he introduced at the post-sentencing hearing did petitioner raise any substantial question as to his mental condition at the time his pleas of guilty were entered. Petitioner's mental condition was not referred to with respect to the presentence motion to withdraw the guilty pleas, nor did his written motion to withdraw the pleas or the supporting affidavit (R. I, 36–37) mention mental incompetency as a reason for the requested withdrawal.[6] The testimony of petitioner and his wife that he was pale and upset the day he changed his pleas (see p. 7, *supra*) described nothing more than would be expected of any person pleading guilty to a crime that might result in imprisonment. Petitioner's testimony (see p. 7, *supra*) and a statement in a government exhibit (Gov. Ex. 1–B, R. II, 150–151) that petitioner was given a 10% disability allowance and received psychiatric therapy for a nervous disorder at the time of his Army discharge in 1946–47[7] certainly did not put the court on notice that petitioner was mentally incompetent to plead guilty some 15 years later. Nor is there anything inconsistent in petitioner's having a speech

[6] Even in his argument at the conclusion of the post-sentence hearing, petitioner's counsel referred to him only as "distraught," "under a nervous strain" (R. I, 132) and made no suggestion of mental incompetence.

[7] The exhibit was introduced not by petitioner to show mental incompetence but by the government to prove that petitioner's counsel had discussed the meaning of the counts in the indictment with him.

impediment[8] and still being able to plead guilty voluntarily and understandingly. Petitioner's counsel did not offer any medical records showing disability of any kind and made no request that the court order a psychiatric examination. Under the circumstances, the court was not obligated to do so.

Dandridge v. *United States*, 356 U.S. 259 (reversing a conviction "[u]pon consideration of the entire record and the confession of error by the Solicitor General"), upon which petitioner relies (Pet. 10–11), is not in point. Unlike the situation here, there was evidence in that case that the accused was suffering from a disabling illness and was actually hospitalized both shortly before and shortly after the date of his plea of guilty, which he later sought to withdraw on the ground that he had been ill. See Memorandum for the United States on writ of certiorari, *Dandridge* v. *United States*, No. 609, Oct. Term, 1957, pp. 7, 8, 13, 15, 16.

4. Petitioner contends in effect that, since he executed an affidavit that his pleas were based on information that he would receive probation and a small fine (R. II, 63) and since he testified that his attorney told him it had been indicated by the government attorney that petitioner would get only three or four months' imprisonment and a small fine (R. II, 78), the court was bound to believe this evidence and to permit withdrawal of the pleas (Pet. 11–13). The district court, however, did not accept

[8] There is no indication in the record that petitioner stuttered at the time he changed his plea; petitioner himself could not remember having done so (R. I, 107).

this evidence but credited the testimony by Mr. Homans, petitioner's counsel, that before the plea of guilty was accepted government counsel had refused to divulge his recommendation beyond saying it would be for a jail sentence and that counsel had advised petitioner it would probably be for one or two years (R. I, 114–116). Although the district court wrote no opinion, it is clear that it rejected petitioner's testimony, as it was at liberty to do. This circumstance distinguishes *United States* v. *Lias,* 173 F. 2d 685 (C.A. 4), where the district judge [redacted] accepted the defendant's sworn allegation that, as a result of what was said by the judge to his attorneys, he was led to believe that he would receive probation if he pleaded guilty.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1962.

Office Supreme Court, U.S.
FILED
SEP 19 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 143

H. HENRY YOUNG,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 998

H. HENRY YOUNG,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

The petitioner respectfully submits that the following comments must be addressed to the brief of the Government in opposition:

1. Among the arguments advanced by the Government to sustain the decision of the Court of Appeals for the First Circuit and to show that the decision is not in conflict with *United States* v. *Lester*, 247 F.2d 496 is the proposition that, because of the fact that the petitioner had counsel, the inquiry made pursuant to Rule 11 of the Federal Rules

of Criminal Procedure was adequate. While it is true that many of the cases arising under Rule 11 involve defendants who are unrepresented by counsel, there is nothing in the language of the rule or in the decided cases to suggest that the trial judge may make a less thorough inquiry if the defendant has a lawyer. Indeed, it has been held by the Court of Appeals for the First Circuit that the rule makes no exception in cases where the defendant has counsel. *Domenica v. United States*, 292 F.2d 483, 486.

In its brief the Government further argues that the cursory questioning of the petitioner prior to acceptance of the guilty plea met the requirements of Rule 11, because the petitioner had listened to an incomplete opening statement by the Assistant United States Attorney. The short answer to this line of reasoning is that neither Rule 11 nor any decision of the Federal Courts has any authority for the rather startling suggestion that the duty of the trial judge in accepting a guilty plea varies depending upon the stage of the trial at which the plea is entered.

In addition to the absence of legal authority, there are grave practical dangers in assuming that the incomplete Government opening informed the petitioner sufficiently. There is no doubt that after listening to Mr. Noonan's opening statement that the petitioner had a better idea of what the Government would try to prove, but can it be said that this opening made it certain that he fully understood the charges contained in an indictment which prints to thirty pages in the record? Having in mind the statement of Judge Waterman in *United States* v. *Lester*, 247 F.2d 496, 500 that "comprehension of the charge demands more than familiarity with the crime alleged", can it be said that a judge could be so certain that the petitioner understood this complex indictment that it became unnecessary to ask even one question directed to this issue?

Underlying the Government's reliance on the opening as

a means of informing the petitioner are two assumptions: (a) that the counts of the indictment mentioned in the opening properly charge a crime and (b) that if the Government were able to prove all the allegations in opening, the crime of concealing assets from the trustee would be established.

Petitioner respectfully submits that each of these premises is false for the reasons which follow:

(a) *From the opening statement it is clear that the indictment was improperly drawn.* Count 1 of the indictment charges that the petitioner concealed property valued at $1,000.00 belonging to the estate of the bankrupt Madison Drug Co., said concealment beginning on or about February 4, 1957 and continuing until September 8, 1960 when the trustee was dicharged. (G.R. 6-7).[1] Count 2 of the indictment charges the concealment of property valued at $2,000.00 from the trustee of Madison Drug Co., said concealment beginning on or about April 8, 1957 and continuing until the trustee was discharged. (G.R. 7).

Both counts allege that a trustee in bankruptcy for Madison Drug Co. was appointed on June 4, 1957; that is, the appointment followed the dates on which the two offenses allegedly began (G.R. 6-7).

From the opening statement of the Assistant United States Attorney the petitioner learned that the concealment charged in Count 1 allegedly arose out of some proceeds *he got from the Madison Drug Co. operations for the period* February 4 to February 26, 1957 (D.R. 50). The petitioner was further told that the concealment alleged in Count 2 arose out of proceeds from an auction sale of Madison inventory on April 8, 1957.

It can be concluded, therefore, from the indictment and the opening that the Government charged two separate and

[1] References to "D.R." are to the Record Appendix filed by the petitioner, and references to "G.R." are to respondent's Record Appendix.

distinct offences occurring on two occasions when the petitioner allegedly received some money from the Madison Drug Company.

Since the crime of concealing assets from a trustee in bankruptcy cannot be committed until a trustee has been appointed, all transfers prior to the appointment, if they do in fact constitute concealments, become one single offense as of the date that the trustee is appointed. *Edwards* v. *United States*, 265 F.2d 302, 306. The practice of including a separate count for each transfer, as was done in the case at bar, was disapproved in the *Edwards* case. A proper indictment would have to charge that all transfers to the petitioner prior to June 4, 1957, the date of the trustee's appointment, constitute one offense.

Further, it cannot be argued that this needless multiplication of offenses was harmless error, for separate fines were imposed on counts one and two.

(b) *Even if all the matters alleged in the opening were proved, no crime under Title 18 United States Code, section 152 would be established.* During various parts of the opening it was alleged that the petitioner received sums of money from the Madison Drug Company. Although no precise amounts were mentioned in the opening, a careful anaylsis of the record leads to the conclusion that the amount allegedly received by the petitioner was no more than $6500.00 (G.R. 50-54). It is also mentioned that the petitioner, through a corporation, was the holder of a recorded first mortgage on the assets of Madison in the sum of $8990.00 (D.R. 48-49).

There is a well settled distinction between concealing assets from a trustee (a criminal offense) and the giving of a preference to one creditor over another (a civil bankruptcy matter). *United States* v. *Alper*, 156 F.2d 222. Since neither the indictment nor the opening contain any allegations that the petitioner received an amount from

Madison in excess of the first mortgage, this case is governed by *Alper*, where it was held a secured creditor can be guilty of concealing assets only to the extent that he receives money or property in excess of his secured claim.

The preceding discussion has ignored the further allegation in the opening that the petitioner received a mortgage for $8,900.00 but gave only $2,200.00 as consideration. Petitioner respectfully submits that this matter, even if established, constitutes a voidable security interest which could be set aside or diminished by appropriate proceedings in the bankruptcy court. No criminal sanctions are imposed under section 152 for receiving a secured claim without adequate consideration.

As another means of justifying the Rule 11 inquiry in the case at bar, the Government points to the fact that the clerk described counts 1, 2 and 22. Factually it cannot be said that clerk's capsule description of the three complex counts [2] could add anything to the petitioner's understanding of the charges to which he was pleading guilty. And as a matter of law there is nothing to sustain the proposition that the clerk may discharge the duty imposed on the judge by Rule 11. See *Domenica* v. *United States*, 292 F.2d 483, 486.

2. In its brief the Government attempts to minimize the significance of *Dandridge* v. *United States*, 356 U.S. 259, by making a factual distinction between the chronology of the illness in *Dandridge* and the illness in the case at bar. Since the *per curiam* opinion of this court in *Dandridge* is based upon the confession of error by the Solicitor General, the holding of that case must lie in the nature of the error confessed, rather than in the precise factual situation.

The vital error which the Government acknowledged in *Dandridge* was the failure of the District Court and the

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[2] The clerk did not mention the dates of the alleged offenses or the nature and value of the assets allegedly concealed. (G.R. 56)

Court of Appeals to make specific findings as to the mental condition of the accused at the time his guilty plea was entered. See memorandum for the United States on writ of certiorari, *Dandridge* v. *United States*, No. 609, Oct. term, 1957.

In both the case at bar and in the *Dandridge* case, the District Court made no express finding on the question of the accused's mental competance when he pleaded guilty. The Court of Appeals in *Dandridge* v. *United States*, 247 F.2d 105 found that there was "no abuse of discretion." In the case at bar the only portion of the opinion of the Court of Appeals that could be related to the issue of mental competence is the general finding that "(t)hat there is nothing whatever to show that the defendant's change of plea was not made voluntarily and with knowledge of its consequences. . . ."

Is the passage from the decision of the Court of Appeals quoted above specific enough to be indistinguishable from the general finding which was disapproved by this Court in *Dandridge?*

The petitioner respectfully submits that the answer to this question presents issues of procedural due process and issues so vital to the administration of criminal justice in the federal courts that certiorari should be granted.

Respectfully submitted,

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